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No. 95-7452

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LYNCE,
Petitioner,

v.

HAMILTON MATHIS, ROBERT BUTTERWORTH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF PETITIONER

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58 pp

QUESTION PRESENTED

Whether the retroactive application of amended Florida penal statute § 944.277 (1992) violates the Ex Post Facto Clause of the United States Constitution by withdrawing early release credits previously awarded to petitioner under the pre-amendment version of the statute, where that withdrawal was based solely upon petitioner's 1985 offense of conviction.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The order of the court of appeals denying petitioner's Application for a Certificate of Probable Cause (J.A. 66) is unreported. The orders of the district court denying petitioner's Petition for Writ of Habeas Corpus and Application for a Certificate of Probable Cause (J.A. 64, 65) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1995. J.A. 66. The petition for writ of certiorari was filed on January 10, 1996 and was granted on May 13, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the United States Constitution, Article I, Section 10, clause 1, provides in pertinent part: "No State shall . . . pass any . . . ex post facto law . . . ."

2. The provisions of § 944.277, Fla. Stat. (Supp. 1992) are set out in Appendix A. The provisions of §§ 921.001, 944.275, 944.276, 944.277, 944.278, and 944.598, Fla. Stat., in all of their relevant versions, as well as § 775.082, Fla. Stat. (1985) and Fla. R. Crim. P. 3.701 (1985), are lodged under separate cover with the Court.

STATEMENT OF THE CASE

1. On April 14, 1986, petitioner Kenneth Lynce pleaded *nolo contendere* to attempted first degree murder and other offenses and was sentenced to 22 years in Florida state prison. J.A. 3, 33, 53.[1]

Between 1983 and 1993, Florida statutes authorized the Florida Department of Corrections to make overcrowding "early release" credits available to eligible inmates upon an executive finding that the prisons had reached a specified percentage of lawful capacity. *See*

[1] The crimes occurred on October 27, 1985. *See* Lodged Documents at 144-45. Petitioner was charged on April 7, 1986 and sentenced on April 14, 1986. *Id.* Petitioner has lodged with the Court copies of public documents containing facts subject to judicial notice, but not included in the Joint Appendix. *See Papasan* v. *Allain*, 478 U.S. 265, 268 n.1 (1986) (Court may take notice of items in public record). The documents lodged with the Court are cited as "Lodg. Doc. ——."

Later, in 1993, petitioner pleaded *nolo contendere* to a separate offense and was sentenced to serve 4 years concurrent with his 22-year term. However, the 22-year term controls the duration of his incarceration. *See* J.A. 34. There is no dispute that, with his 1860 days of provisional release credits, petitioner would be entitled to immediate release. *See* J.A. 34, 50-52.

§ 944.598, Fla. Stat. (1983); § 944.276, Fla. Stat. (1987); § 944.277, Fla. Stat. (Supp. 1988). On the date of his offense, petitioner was statutorily eligible for early release credits conditioned on good behavior and prison overcrowding, which at that time were called emergency gain-time. § 944.598, Fla. Stat. (1985).[2] During his incarceration, petitioner became successively eligible under Florida law for early release credits that supplanted but were the substantial equivalent of emergency gain-time, including "administrative gain-time,"[3] and "provisional release credits."[4] When awarded, these credits reduced the actual time an inmate was required to serve in prison, *i.e.*, the time was "credited" against the prison sentence pronounced by the sentencing judge. Inmates maintained their eligibility for overcrowding-related credits through good behavior.[5]

[2] "Emergency gain time" was only available if Florida prison population reached a threshold percentage of capacity. *See* § 944.598, Fla. Stat. (1985) (Lodg. Doc. 27). Because the Florida prison population did not exceed the statutory trigger percentage, the Department of Corrections did not award emergency gain time to any inmate between 1983 and 1986.

[3] *See* § 944.276, Fla. Stat. (1987) (Lodg. Doc. 17).

[4] *See* § 944.277, Fla. Stat. (Supp. 1988) (Lodg. Doc. 19). From the perspective of the recipient, there was no relevant distinction among the different types of overcrowding credits. All such credits were awarded conditional on the inmate's good behavior and an executive finding that the prison system was approaching its lawful capacity. *See* § 944.598, Fla. Stat. (Supp. 1986) (Lodg. Doc. 29); § 944.276, Fla. Stat. (1987); § 944.277, Fla. Stat. (Supp. 1988). As part of a major revision of the Florida sentencing system in 1993, the Florida legislature repealed § 944.277. *See* 1993 Fla. Laws ch. 93-406. Florida thus no longer uses provisional credits as an early release mechanism. *See* § 944.278, Fla. Stat. (1993), (Lodg. Doc. 16).

[5] Inmates could obtain emergency credits if they were receiving "gain-time," which in turn depended on good behavior. *See* § 944.598(2), Fla. Stat. (1985) (Lodg. Doc. 27). Inmates were eligible for administrative gain-time and provisional credits as

Beginning in 1987, the Florida Legislature created a series of new offense-based exclusions from eligibility for early release credits.[6] A 1989 amendment to § 944.277 added an exclusion for inmates convicted of murder offenses, including petitioner's crime of attempted murder.[7] The 1989 amendment, and subsequent amendments containing the same exclusion enacted in 1990 and 1991, were applied prospectively only.[8] The 1992 amendment at issue in this case, effective July 6, 1992, contained the same offense-based exclusion. *See* § 944.277(1)(i), Fla. Stat. (Supp. 1992) (App. A).[9] The Florida Secretary of Corrections initially interpreted the 1992 amendment, like the earlier amendments to § 944.277(1), to apply only prospectively.

2. As the result of crowded prison conditions and Petitioner's good behavior, the Secretary of Corrections,

long as they were earning "incentive gain-time." *See* § 944.276(1), Fla. Stat. (1987); § 944.277(1), Fla. Stat. (Supp. 1988). Awards of incentive gain-time required that the inmate take positive action beyond mere observance of prison rules, such as holding a prison job. *See* § 944.275(4)(b), Fla. Stat. (1985) (Lodg. Doc. 13).

[6] The 1987 law providing for administrative gain-time, § 944.276, excluded from eligibility inmates serving mandatory minimums for certain felonies and convicted sex offenders who had not successfully completed a treatment program. The 1988 law creating provisional release credits, § 944.277, excluded habitual offenders, inmates serving mandatory minimums for drug and capital offenses, and inmates convicted of certain felonies in connection with an attempted or completed sexual assault.

[7] *See* § 944.277(1)(i), Fla. Stat. (1989) (Lodg. Doc. 21).

[8] *See* 1992 Op. Att'y Gen. Fla. 92-96 at 288 (December 29, 1992) (App. B).

[9] Petitioner's initial brief was somewhat imprecise in describing the chronology in 1992. *See* Pet. for Cert. at 3. The 1992 amendment to § 944.277(1)(i) was effective on July 6, 1992. Petitioner was released from prison on October 1, 1992. J.A. 50. The opinions of the Florida Attorney General prescribing the retroactive application of the 1992 amendment to § 944.277(1) were issued on December 29 & 31, 1992. *See* App. B & D.

acting pursuant to § 944.277, granted petitioner 1,860 days of "provisional release credits" toward early release between 1988 and 1991. J.A. 50.[10] Based on those credits, and on petitioner's full satisfaction of all of the statutory requirements for award and maintenance of early release credits, the State of Florida released petitioner from prison pursuant to § 921.001(10)(d) (Supp. 1992) on his mandatory release date of October 1, 1992. J.A. 50.[11]

On December 29, 1992, the Florida Attorney General, responding to the concerns of Florida legislators and state officials about the imminent release of a notorious sex offender and murderer, issued an opinion stating that the offense-based exclusions contained in § 944.277(1), as amended in 1992 ("the 1992 Act"), applied retroactively to exclude from eligibility for provisional credits all inmates who committed such offenses prior to the law's enactment.[12] Two days later, in response to an inquiry

[10] The Joint Appendix contains a typographical error, incorrectly indicating that petitioner received 1360 days of provisional release credits that were revoked pursuant to the 1992 Act. J.A. 52 (Glover Affidavit). The actual number of provisional release credit days awarded to petitioner was *1860*, as indicated two pages earlier in the same affidavit. *Id.* at 50.

[11] Florida law required the Secretary of Corrections to establish a non-discretionary "provisional release date," and to release petitioner on that date. *See* §§ 944.277(3), (5), 921.001(10)(d), Fla. Stat. (Supp. 1988) (Lodg. Doc. 12, 19-20). Florida further required that prisoners convicted on or after July 1, 1988 be released to probation or supervised release. *See* § 944.277(5), Fla. Stat. (Supp. 1992). Prisoners who committed offenses before July 1, 1988—including petitioner—were released unconditionally. *See id.*; Judgment and Sentence, *State of Florida* v. *Kenneth R. Lynce*, Orange Cty. CR 85-6173 (April 14, 1986) (Lodg. Doc. 146-50) (imposing no supervised or conditional release terms).

[12] *See* 1992 Op. Att'y Gen. Fla. 92-96 (December 29, 1992) (App. B). The opinion refers to sex offender Donald G. McDougall several times. *See id.* The rationale for the retroactive application of amended § 944.277 was that prior amendments in 1990 and 1991 had expressly provided for prospective application, while the 1992 amendment was silent on this matter. *Id.* at 287-89.

from the Department of Corrections, the Attorney General directed the Department to cancel all credits previously earned by inmates now deemed covered by the 1992 exclusions, reasoning that the award of provisional release credits was "strictly an administrative mechanism to relieve prison overcrowding." [13]

Pursuant to this executive agency re-interpretation of the 1992 Act, the Department of Corrections revoked the 1,860 days of provisional credit previously awarded to petitioner. J.A. 51. Because petitioner had been released from prison several months earlier, the Department sought a warrant for his rearrest. J.A. 51. On May 17, 1993, the sentencing court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. J.A. 51. Petitioner was arrested on June 8, 1993 and returned to prison. J.A. 51. The retroactive cancellation of petitioner's credits pushed his release date back to May 19, 1998. J.A. 52.

3. On August 18, 1994, petitioner filed a petition for a writ of habeas corpus alleging, *inter alia*, that the retroactive application to him of amended § 944.277(1) violated the prohibition against ex post facto laws set forth in Article I, Section 10, clause 1 of the United States Constitution. J.A. 2-29. Petitioner argued that the revocation of all provisional release credits previously awarded to him and his resultant re-incarceration was an unconstitutional increase in punishment for a crime after its commission. J.A. 22-25.

On March 14, 1995, a United States Magistrate Judge for the Middle District of Florida, relying on the Eleventh Circuit's opinion in *Hock* v. *Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996), recommended that the petition be denied and dismissed with prejudice on the ground that the 1992 Act was adopted merely as a means to relieve prison overcrowding

[13] *See* Letter to Secretary Singletary (Dec. 31, 1992) (App. D).

and was, therefore, not subject to the prohibitions of the Ex Post Facto Clause. J.A. 53-60. The United States District Court for the Middle District of Florida adopted the Report and Recommendation and dismissed the petition on May 10, 1995. J.A. 64.[14] Petitioner subsequently filed with the district court an Application for a Certificate of Probable Cause, which the court denied on June 16, 1995. J.A. 65.

4. The United States Court of Appeals for the Eleventh Circuit denied without comment petitioner's renewed Application for a Certificate of Probable Cause by Order dated October 16, 1995. J.A. 66.

On Jan. 10, 1996, petitioner filed with this Court a petition for writ of certiorari. On May 13, 1996, the Court granted certiorari. J.A. 67.

SUMMARY OF ARGUMENT

This case involves an inmate who served the full time prescribed by Florida law for his crime, was released from custody unconditionally, and then, based on a belated interpretation of a new state statute, was reincarcerated by the State of Florida for an additional five years for the same offense. Respondents used the 1992 Act to strip petitioner of early release credits previously awarded

[14] Respondents initially argued in district court for the dismissal of Mr. Lynce's habeas corpus petition on the ground that he had failed to exhaust state law remedies. Respondents conceded, however, that with respect to the central question of the retroactive cancellation of early release credits, exhaustion would be futile. *See* Respondent's Answer to Petition for Writ of Habeas Corpus (J.A. 36). Indeed, the Florida Supreme Court had recently held constitutional the retroactive application of § 944.277 (1992) to withdraw provisional release credits already awarded, *see Griffin* v. *Singletary*, 638 So. 2d 500, 501-02 (Fla. 1994), *see also Dugger* v. *Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied sub nom. Rodrick* v. *Singletary*, 502 U.S. 1037 (1992), and there was no reason to believe that the court would change its position. *See* Petition for Writ of Habeas Corpus (J.A. 12-14); *see also Schall* v. *Martin*, 467 U.S. 253, 261 (1984).

and reimprison him, thereby retroactively increasing the punishment for his crime. The 1992 Act, as applied to petitioner, is an unconstitutional ex post facto law, because it directly increased the punishment for his crime, several years after its commission.

A long line of cases from this Court has established that laws that retroactively increase punishment are prohibited by the Ex Post Facto Clause. This foundational principle is rooted in the Framers' concern—based on their own experience—that in the absence of an absolute and unequivocal prohibition, state and federal governments would be free to modify crimes and their punishments without fair warning or notice to potential offenders, and to enact arbitrary or vindictive retroactive legislation targeting disfavored groups. Respondents' application of the 1992 Act ignored that prohibition, in an exercise of precisely the governmental excesses the Ex Post Facto Clause is designed to prevent.

The central feature of punishment for a felony is the actual length of incarceration. Under Florida law, a prisoner's "real sentence," *i.e.*, the actual duration of his incarceration, is determined by the interaction of the nominal sentence imposed by the sentencing judge pursuant to sentencing guidelines and several statutorily prescribed types of early release credits. By nullifying early release credits previously awarded to petitioner, the 1992 Act directly increased his punishment, lengthening his actual term of incarceration by more than five years.

Unlike changes to procedures this Court has upheld as having only a conjectural effect on actual punishment, the increased punishment meted out to petitioner was a direct and certain result of the application of the 1992 Act. Petitioner completed his sentence and was released unconditionally in October 1992, nearly three months before the Florida Attorney General's opinion. Petitioner's re-incarceration by the Florida Department of Corrections in June of 1993 was based solely on his 1985 offense

of conviction.[15] Thus, the re-imprisonment of petitioner for an additional five years for the same conduct was the direct and concrete result of the retroactive application of the 1992 Act.

Exempting the retroactive cancellation of provisional release credits from the proscription of the Ex Post Facto Clause would flatly contravene established precedent from this Court. The Court has consistently refused to allow the retroactive application of laws changing sentencing formulas, and mechanisms determinative of actual sentence length, to the detriment of persons who committed crimes prior to the enactment of the new sentencing laws. *See, e.g., Miller* v. *Florida*, 482 U.S. 423 (1987); *Weaver* v. *Graham*, 450 U.S. 24 (1981); *Lindsey* v. *Washington*, 301 U.S. 397 (1937). The 1992 Act, as applied to petitioner, retroactively changed the formula for calculating his term of incarceration. Indeed, in applying the 1992 Act, respondents went much further by actually revoking *previously awarded credits*, which resulted in the imposition of a longer term of incarceration not only after the commission of the crime, but also after sentence had been imposed and fully served.

This Court has held that whether a given statutory change constitutes an ex post facto violation is a matter of degree. It would be irrational to find that, while the retroactive application of a new formula for calculating an offender's initial sentencing range offends the Constitution, a law which operates retroactively to increase a sentence after it is imposed and served somehow falls outside the protection of the Ex Post Facto Clause.

Moreover, given the mounting overcrowding crisis in Florida's prisons in 1986, it was rational for Mr. Lynce

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[15] As previously noted, *supra* note 1, shortly after his reincarceration in 1993, petitioner pleaded *nolo contendere* to an independent new charge based on conduct after his October 1992 release, and was sentenced to four years to be served concurrently with the renewed sentence (for his 1985 crime) at issue in this case.

(and for similarly situated accused offenders) to factor the availability of these credits into his decision to plead *nolo contendere* to the charge of attempted murder. Thus, the 1992 Act also violated petitioner's interest in notice and fair warning and his reasonable expectation at the time of his plea and sentencing, based on the law in effect in 1986, that there existed a strong likelihood that early release credits based on prison overcrowding would shorten his prison term.

The 1992 Act is not a procedural law. The *sine qua non* of a purely procedural law for purposes of ex post facto analysis is the lack of effect on the quantum of punishment attached to the crime. The 1992 Act changed the quantum of punishment attached to a particular crime by excluding a selected group of offenders from eligibility for future credits and by canceling the credits they had already earned under the prior law. Whether the former law was enacted as a matter of administrative convenience is irrelevant—the 1992 Act is a substantive penal statute, fully subject to the requirements and prohibitions of the Ex Post Facto Clause.

ARGUMENT

I. THE 1992 AMENDMENT TO § 944.277 (the "1992 Act"), WHICH RETROACTIVELY WITHDREW PROVISIONAL RELEASE CREDITS FROM FLORIDA PRISONERS AFTER THOSE CREDITS WERE AWARDED, VIOLATED THE EX POST FACTO CLAUSE BY INCREASING PETITIONER'S PUNISHMENT FOR CRIMES AFTER THEIR COMMISSION.

The Ex Post Facto Clause of the United States Constitution prohibits laws that retroactively increase the punishment attached to a crime. *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1601 (1995); *Collins* v. *Youngblood*, 497 U.S. 37, 42 (1990); *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-92 (1798). It has been established

since the early days of our Republic that the constitutional prohibition against ex post facto laws is essential to restrain the arbitrary and vindictive exercise of government power, and to allow affected individuals to rely upon contemporary penal laws until those laws are explicitly changed. *Id.* at 387; *see Weaver*, 450 U.S. at 28-31; The Federalist No. 44 (James Madison); The Federalist No. 84 (Alexander Hamilton).[16] The fact that the Ex Post Facto Clause is one of the few express limits on the powers of the states found in the Constitution attests to its importance as a fundamental limitation on governmental power. *See* U.S. Const. art. I, § 10, cl. 1. An unbroken line of cases from *Calder* through *Morales* has held that the Ex Post Facto Clause prohibits state and federal governments from increasing the punishment for a crime retroactively, regardless of the government's reason for increasing the punishment, or the label it affixes to the law effecting that change. *See, e.g., Youngblood*, 497 U.S. at 43; *Weaver*, 450 U.S. at 31.

However, the Court has held that not every law that retroactively "disadvantages" an offender violates the Constitution. *Morales*, 115 S. Ct. at 1601, 1602 n.3. A retroactive criminal law disadvantaging an offender does not violate the Ex Post Facto Clause if it is merely "procedural." *See Dobbert* v. *Florida*, 432 U.S. 282, 293-94 (1977). To violate the constitutional prohibition, a law must "produce a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S. Ct. at 1603. Although this Court has not enunci-

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[16] Justice Chase, writing for the Court in *Calder*, eloquently described the Framers' historical and contemporary concerns, and the policies underlying the Ex Post Facto Clause, concluding that the Clause was one of the great principles of our social compact. *Calder*, 3 U.S. (3 Dall.) at 388-390. *Calder* identified four categories of laws prohibited by the Ex Post Facto Clause, two of which are most pertinent here: "2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390.

ated a precise formula for determining how large this risk must be, *Morales* made clear that laws creating only a "speculative, attenuated risk" of increasing punishment do not violate the Ex Post Facto Clause. *Id.* at 1603.

A. As Applied to Petitioner, the 1992 Act Violated the Ex Post Facto Clause by Increasing Retroactively the Punishment for His Crime After Its Commission and Returning Him to Prison for an Additional Five Years.

The central question in an ex post facto analysis of changes to laws affecting criminal sentences is not whether a prisoner's original sentence technically has been increased by a retroactive law, but whether an important statutory determinant of the actual length of his sentence has been altered to his detriment. *See Weaver*, 450 U.S. at 32; *Lindsey* v. *Washington*, 301 U.S. 397, 401-02 (1937). Accordingly, this Court has held that the determinants of early release are properly considered part of the punishment of a crime. *See Weaver*, 450 U.S. at 32; *Warden* v. *Marrero*, 417 U.S. 653, 662-63 (1974).[17]

The three most closely analogous ex post facto decisions of this Court compel the conclusion that the application of the 1992 Act to petitioner retroactively increased his punishment, in violation of the Ex Post Facto Clause and the interests it protects. In *Lindsey* v. *Washington*, 301 U.S. 397 (1937), the Court considered a statute that

[17] From a practical standpoint, laws directly influencing a prisoner's date of release are an integral part of the punishment for crimes, because they are a significant factor in both a defendant's plea decision and in a judge's calculation of the sentence to be imposed. *See Weaver* 450 U.S. at 32; *Marrero*, 417 U.S. at 658. *Marrero* also noted that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause . . . of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.'" *Id.* at 663 (emphasis in original) (quoting *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905)).

changed what had previously been the maximum sentence for the crime of grand larceny to the mandatory sentence. This Court held that the application of this statute to persons who committed grand larceny before its enactment violated the Ex Post Facto Clause, by increasing the measure of punishment prescribed by the statute in effect when the crimes were committed. *See id.* at 400-01. The Court rejected the argument that the new law was constitutional because it was possible that the sentencing court might have imposed the statutory maximum under the old statute, which would result in the same prison sentence required by the new statute. *Id.* The Court emphasized that the constitutional transgression of the statute was the detrimental change in the *possible penalty* for a crime already consummated. *See id.* at 401.

Reaffirming the basic principle of *Lindsey*, the Court held in *Weaver* and in *Miller* v. *Florida*, 482 U.S. 423 (1987), that statutes that alter the formula used to calculate the sentences of individuals who committed crimes before the changes were enacted violate the Ex Post Facto Clause. The offending statute in *Weaver* retroactively reduced the number of days, *i.e.*, "early release credits," deducted from inmates' sentences for compliance with prison rules. *See Weaver*, 450 U.S. at 26-28. As applied, the statute at issue in *Weaver* had the prohibited effect of retroactively increasing the minimum sentence that the petitioner could have received under the law in place at the time of his crime. *See id.* at 33-35. Similarly, in *Miller*, the statute in question altered the formula for calculating the petitioner's presumptive sentencing range by increasing the number of sentencing "points" assigned to his offense *after* he committed the crime. *See Miller*, 482 U.S. at 425-27. The Court struck down the retroactive application of this law as an unconstitutional ex post facto increase in petitioner's punishment. *See id.* at 435-36.

In *Morales*, 115 S. Ct. at 1601, the Court made clear the continued vitality of the *Lindsey-Weaver-Miller* "trilogy" when it distinguished the procedural change at issue in the case at bar from the ex post facto violations found in the trilogy.[18] The Court reaffirmed the core principle of the trilogy, citing the cases for the proposition "that a legislature may not stiffen the 'standard of punishment' applicable to crimes that have already been committed" by "changing the sentencing range applicable to covered crimes. . . ." *Morales*, 115 S. Ct. at 1601, 1602. Legislative "adjustments to mechanisms surrounding the sentencing process"—like early release credits—are evaluated under the same standard. *Id.* at 1603 n.4.

Based on the standards established in *Lindsey*, *Miller* and *Weaver*, this is not even a close case. If the Florida Legislature had merely declared that, from the effective date of the 1992 Act forward, petitioner and similarly situated prisoners would no longer be eligible to receive provisional release credits, this case would be essentially on all fours with *Weaver*. *See Morales*, 115 S. Ct. at 1601 (Ex Post Facto Clause prohibits retroactive statutes having "the purpose and effect of enhancing the range of available prison terms. . .").[19]

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[18] As described in greater detail, *infra*, *Morales* involved a state statute that reduced the presumptive frequency of parole hearings for persons convicted of homicide, but retained identical substantive standards governing a prisoner's eligibility for parole. *Morales*, 115 S. Ct. at 1602. The Court held that because the statutory change was a mechanical change creating no significant risk of increased punishment, it did not transgress the boundaries set by the Ex Post Facto Clause. *Id.* at 1603.

[19] There can be no question that the 1992 Act is a retroactive law. This Court recently stated that a law is retroactive if "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). This inquiry requires a court to determine the nature of the legal change and the degree of connection between this change and relevant past events. *Id.* At the time of his conviction, petitioner was eligible for all types of early release credits. The 1992 Act rendered him ineligible for provisional credits and resulted in the cancellation of credits already held. Thus, the 1992 Act changed the legal consequences of a crime committed in 1985. Moreover, the immediate withdrawal of credits previously earned demonstrates that there was a direct and substantial connection between the legal change and petitioner's past crime.

Because the 1992 Act, as applied, did not stop at canceling petitioner's eligibility for the future award of credits, the retroactive punishment inflicted on petitioner was more egregious than those held unconstitutional in *Lindsey*, *Weaver* and *Miller*. Respondents applied the 1992 Act to withdraw 1,860 days of early release credits *already awarded* to him under a prior statute, resulting in the retroactive "re-calculation" of his release date *after he had been released* from prison. Thus, as a direct and immediate result of the application of the 1992 Act, petitioner was re-arrested and returned to prison to serve more than five additional years. It is difficult to envision a more clear example of a statute that "[made] more burdensome the punishment for a crime, after its commission. . . ." *Youngblood*, 497 U.S. at 52.[20]

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[20] The conclusion that the application of the 1992 Act to petitioner violates the Ex Post Facto Clause is supported by *Arnold* v. *Cody*, 951 F.2d 280 (10th Cir. 1991). There, the Tenth Circuit invalidated a statute which denied inmates continued ability to acquire early release credits available under prior law. *Id.* The statute at issue in *Arnold* provided for selective withdrawal of eligibility for "overcrowding" early release credits. *See id.* at 281. Critical to the *Arnold* court's holding was its finding that credits earned for good behavior were indistinguishable from credits acquired as the result of prison overcrowding. *Id.* at 283. *Arnold* lends support to the conclusion that laws changing eligibility standards for prison overcrowding credits are indistinguishable from the law reducing good behavior credits which this Court held invalid in *Weaver*. Moreover, the fact that the 1992 Act was used to strip petitioner of provisional credits previously awarded (rather than simply deny him future eligibility) suggests that this law lies even further toward the unconstitutional end of the spectrum

Whether the statutory change in the punishment for a crime is accomplished by a change to the nominal sentence imposed by the sentencing judge, as in *Lindsey*, or by adjusting a related determinant of a prisoner's "real" punishment, as in *Weaver*, is of no legal relevance. *See Lindsey*, 301 U.S. at 401; *Weaver*, 450 U.S. at 35-36. The 1992 Act had the direct and undeniable effect of increasing petitioner's punishment after his crime had been consummated. Therefore, the Act violated the clear command of the Constitution, as consistently enforced in every Ex Post Facto Clause decision rendered by this Court from *Calder* through *Lindsey* to *Morales*.

B. *Morales'* Refinement of the *Lindsey-Weaver-Miller* Rule Does Not Change the Result in This Case.

Although the Court's recent decision in *Morales* refocused the ex post facto analysis in some respects, the retroactive increase in punishment effected by the 1992 Act is just as clearly prohibited today as it was before *Morales*. In *Morales*, the Court simply clarified that, in order to show an ex post facto violation, an offender must show the retroactive harm was more than some ambiguous "disadvantage," or the mere denial of an uncertain "opportunity" to take advantage of early release provisions. *Morales*, 115 S. Ct. at 1602 n.3. Instead, a statutory change violates the ex post facto prohibition if it "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* (citing *Youngblood*, 497 U.S. at 41). *Morales* also made clear that the application of the Ex Post Facto Clause is a matter of degree and that small "mechanical" changes producing only a slight or speculative risk of increasing

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than the offending law in *Arnold*. *See Morales*, 115 S. Ct. at 1603 (whether given retroactive statute violates Ex Post Facto Clause is matter of degree).

a prisoner's term of confinement do not fall within the constitutional prohibition. *Id.* at 1602-03.[21]

The respondent in *Morales* was a twice-convicted murderer. At the time respondent committed the second murder, California statutes provided for annual parole suitability hearings. *Id.* at 1600. After the second murder, but before respondent was sentenced, California changed its law to provide that, after a multiple murderer's initial parole suitability hearing, future hearings could be deferred for up to three years if the parole board found that it was unreasonable to expect that the prisoner would be found suitable for parole in the intervening years. *Id.* The substantive standards for determination of eligibility for parole were identical to those in effect at the time of the offense. *Id.* at 1602-03. The Court rejected the respondent's challenge to the change in the frequency of parole hearings, finding the slight risk that such a change might increase his actual term of confinement too speculative, attenuated and conjectural, and thus insufficient to warrant invalidation under the Ex Post Facto Clause. *Id.* at 1604-05.

As applied to petitioner, the 1992 Act unquestionably "produce[d] a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 1603. Far from the "speculative and attenuated" connection presented in *Morales*, the link between the withdrawal of provisional release credits from petitioner and the substantial lengthening of his prison term was clear, direct,

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[21] Examples of sentencing and parole law changes falling outside the protections of the Ex Post Facto Clause cited in *Morales* included changes to the membership of parole boards, changes to the hours of prison law libraries, restrictions on a defendant's time to speak before a sentencing judge, and page limits on a defendant's objections to presentence reports or petitions for pardon. *Id.* at 1603. None of these remotely approaches in severity the direct lengthening of a sentence by five years after a full sentence had been lawfully served.

and certain. *Id.* The "risk" of increased punishment for petitioner's crime resulting from the application of the 1992 Act was 100%. *Cf. id.* As the direct and certain result of the retroactive application of the 1992 Act, the State of Florida increased petitioner's punishment over that prescribed by the law in effect at the time of his crime, reimprisoning him for an additional five years.

Moreover, unlike the statute at issue in *Morales,* the 1992 Act contained absolutely no features to reduce the risk that the statute would increase petitioner's punishment. The statute challenged in *Morales* afforded protections that minimized the risk that a prisoner would serve a longer time in prison than he would have served under the prior law. *See id.* at 1603-05. First, the statute applied to a class of prisoners with only a remote possibility of release on parole. *See id.* at 1603. Second, the parole board was required to make a specific finding for each prisoner at his mandatory initial hearing that the likelihood of release on parole was effectively nil. *See id.* at 1604. Finally, the parole board retained discretion to tailor the frequency of subsequent hearings to the circumstances of the particular prisoner. *See id.* The existence of these protections meant that "the practical effect of a hearing postponement [was] not significant." *Id.* at 1605.

By contrast, the 1992 Act was an unadorned offense-based exclusion from eligibility for early release credits. *See* § 944.277, Fla. Stat. (Supp. 1992) (App. A). The Florida Attorney General discovered authority to cancel petitioner's early release credits not in the language of the 1992 Act, but rather in implied legislative intent.[22] Any protective features would necessarily emanate from the

[22] The Attorney General reasoned that since past amendments had expressly provided for prospective application of § 944.277, the lack of any such directive in the 1992 Act suggested a legislative intent for it to apply retrospectively. *See* 1992 Op. Att'y Gen. Fla. 92-96 at 287-89 (Dec. 29, 1992) (App. B).

same source. The Attorney General apparently did not discern any intent by the Florida Legislature to limit in any way the power of the Department of Corrections to withdraw previously awarded credits. *See* Letter to Secretary Singletary (Dec. 31, 1992) (App. D). The absence of any protective or mitigating features in the 1992 Act similar to those in the law upheld in *Morales* reinforces the conclusion that the increase in punishment imposed by Florida is proscribed by the Ex Post Facto Clause.

C. Provisional Release Credits and Other Early Release Credits Are an Integral Part of the Punishment Attached to Petitioner's Crime and a Critical Determinant of the Length of His Incarceration.

This Court has established that statutory "adjustments" to a prison sentence are part and parcel of the punishment imposed. *See Weaver,* 450 U.S. at 32; *Warden* v. *Marrero,* 417 U.S. 653, 658 (1974); *see also Morales,* 115 S. Ct. at 1603 n.4 (adjustments to "mechanisms surrounding the sentencing process" are subject to same ex post facto analysis as other statutory changes). Penal laws that add or subtract time from an inmate's period of incarceration need not be "in some technical sense part of the sentence" to be an essential determinant of the actual punishment for crimes. *Weaver,* 450 U.S. at 32 (citing *Lindsey,* 301 U.S. at 402-03); *cf. Marrero,* 417 U.S. at 662-63 (parole is an element of punishment).

Early release credits were an integral component of Florida's structured sentencing system as it existed during the period relevant to this case.[23] Beginning in 1983,

[23] Implicit in the Court's opinion in *Morales* is the principle that a statute would violate the Ex Post Facto Clause if it operated directly to deny a prisoner parole under circumstances in which he would clearly have been granted parole under the statute in effect at the time he committed the crime. *See generally Morales,* 115 S. Ct. 1597. Early release credit, or "gain-time" is as integral to the punishment for a crime in Florida as parole had been under

Florida imposed prison sentences under a "real offense" sentencing guidelines system. Under this system, the statutes defining the criminal offense provide only the extreme outer limits of the sentence that lawfully could be imposed.[24] However, under ordinary circumstances, the sentence actually pronounced by the judge is determined by application of a sentencing matrix established by the Florida Sentencing Guidelines. *See generally* §§ 921.001-921.005, Fla. Stat. (1985) (Lodg. Doc. 9-10). At the time petitioner committed his crime, the "real time" served by a person convicted of a crime in Florida, *i.e.*, the time he actually served in prison, was determined by the interaction of the guideline sentence pronounced by the sentencing judge and several types of "gain-time" or early

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the traditional sentencing system in place in Florida prior to 1983. The legislative history of the Florida Correctional Reform Act of 1983, 1983 Fla. Laws ch. 83-131, demonstrates that "gain-time" in all of its forms was intended to function as the substitute for parole within the framework of structured sentencing. Under the new early release regime, "[p]ersons convicted on or after the effective date of the act [would] no longer be eligible for parole and [would] have their release governed by expiration, *gain-time*, or clemency." *See* Senate Staff Analysis and Economic Impact Statement for SB 644 at p. 2 (May 24, 1983) (emphasis added) (Lodg. Doc. 39). The legislative history of the 1987 law creating administrative gain-time also demonstrates the Legislature's intent that gain-time would supplant parole as the primary mechanism for shortening an inmate's term of confinement: "With the creation of the Sentencing Guidelines by the 1983 Legislature and the elimination of parole for inmates sentenced after Oct. 1, 1983, gain-time accumulation is virtually the exclusive method of release from confinement." *See* Senate Staff Analysis and Economic Impact Statement for SB 3A at p. 1 (Feb. 4, 1987) (Lodg. Doc. 46). When this new provision for overcrowding-related early release credits was enacted, it was clear that "nondiscretionary release device[s]" were as instrumental as parole had been in "determin[ing] the actual length of sentence to be served." *See id.*

[24] The statute prescribing the outer limit of petitioner's sentence was § 775.082, Fla. Stat. (1985) (Lodg. Doc. 2).

release credits.[25] The guideline statute in effect at the time of petitioner's offense and conviction provided, in part, that an offender "shall be released from incarceration . . . [u]pon expiration of his sentence *as reduced by accumulated gain-time*." § 921.001(8)(b), Fla. Stat. (1985) (emphasis added) (Lodg. Doc. 10).

State law plainly provides that early release gain-time was an integral part of the punishment imposed for petitioner's offense. The sentencing guidelines promulgated by the Florida Supreme Court provides as follows:

> [t]he sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain-time.

Fla. R. Crim. P. 3.701(b)(5) (1985) (reported in *The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988—Sentencing Guidelines)*, 468 So. 2d 220, 222 (Fla. 1985)) (Lodg. Doc. 32).

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[25] Early release credits in the form of "emergency gain-time" were created at the same time as Florida's sentencing guidelines and accompanied the abolition of parole and other major sentencing reforms. *See* The Correctional Reform Act of 1983, 1983 Fla. Laws ch. 83-131 (codified in part at § 944.598, Fla. Stat. (1983)) (Lodg. Doc. 26); *see also* § 921.001(3), (7), Fla. Stat. (1983) (Lodg. Doc. 7-8). Under pre-1983 indeterminate sentencing, parole and gain-time had been used for early release to target limited penal resources. *See, e.g.*, Senate Staff Analysis and Economic Impact Statement for SB 210 at p. 1 (rev. Mar. 7, 1989) (Lodg. Doc. 48-49); Corrections Overcrowding Task Force, *Final Report and Recommendations* 65 (1983) ("COTF Report") (Lodg. Doc. 109). The new guidelines and the abolition of parole gave rise to another early release mechanism to replace parole. *See, e.g.*, Samuel Jacobson, *Sentencing Guidelines*, 57 Fla. Bar J. 234, 236 (1983); Jim Smith, Fla. Att'y Gen., *A Major Revision of the System is Needed*, at 208-09 (in Jacobson, *Sentencing Guidelines* (1983)); COTF Report at 68-70. Gain-time, including emergency gain-time and its successors, replaced parole as the primary limitation on the duration of the new guidelines sentences. *See, e.g.*, Fla. R. Crim. P. 3.701(b)(5) (1983, 1985) (Lodg. Doc. 32).

In 1988, when the Legislature created provisional release credits, it also amended the sentencing statute to provide that a prisoner "shall be released from incarceration" on the occurrence of one of four events, including "attain[ment] [of] the provisional release date." § 921.001(10), Fla. Stat. (Supp. 1988). A prisoner's "provisional release date" is the date determined by the length of the sentence imposed by the sentencing judge, as reduced by early release credits, including "gain-time" and provisional release credits. *See* § 944.277(3), Fla. Stat. (Supp. 1992) (App. A) (provisional release date); *see also* § 944.275(3), Fla. Stat. (1987) (Lodg. Doc. 17) (tentative release date).

Respondents apparently concede that early release credits awarded for good behavior and diligent labor are an integral part of the punishment for crimes under Florida law and, therefore, cannot be withdrawn without violating the Ex Post Facto Clause. *See Dugger* v. *Rodrick*, 584 So. 2d 2 (Fla. 1991) (cited with approval in 1992 Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992) (App. B)), *cert. denied sub nom. Rodrick* v. *Singletary*, 502 U.S. 1037 (1992). Indeed, the Florida Attorney General recently opined that a rule denying good behavior and incentive credits may be applied only prospectively and that credits previously awarded may not be withdrawn. *See* Op. Att'y Gen. Fla. 96-22 (March 20, 1996) (Lodg. Doc. 61-64). However, Respondents contend that early release credits awarded based on the same criteria, but available only during periods of prison overcrowding, are so different in kind that they are exempt from the requirements of the Ex Post Facto Clause. Opp. to Pet. for Cert. 5-9.

Neither the law nor the practical operation of the Florida penal system supports such a distinction between provisional credits and good behavior credits. It is unreasonable and logically inconsistent to acknowledge that good behavior credits reduce punishment, while simultaneously maintaining that provisional credits are merely "administrative" and do not affect significantly the punishment attached to a crime.[26] Under Florida law, "gain-time" and "incentive gain-time" credits are awarded for various types of good behavior. *See* § 944.275, Fla. Stat. (1987) (Lodg. Doc. 17). Provisional release credits were additional credits awarded for good behavior when prisons were overcrowded. § 944.277, Fla. Stat. (Supp. 1988, 1989) (Lodg. Doc. 19-20, 21-22).[27] Thus, provisional credits and good behavior credits are identical except that the former only became available if Florida prisons approached their lawful capacity. Effectively, prior to the 1992 Act Respondents could award a certain quantity of "good behavior" early release credits and then, in the event prison population reached a certain level, they could award additional, indistinguishable credits to the same prisoners who qualified for good behavior credits.

Respondents can offer no principled basis to distinguish between provisional release credits and other types of early release credits for purposes of ex post facto analysis.

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[26] The judge who sentenced petitioner apparently held the common sense view that early release credits were part of the petitioner's sentence, and that the different types of credits are indistinguishable from the standpoint of punishment. In his sentencing order, Judge Walter Komanski recommended that, "[i]n imposing the above sentence, . . ." the Department of Corrections should make available "credit Good/Gain-time." Lodg. Doc. 150. This brief entry on the "SENTENCE" form suggests that, in the sentencing judge's mind, both good behavior credits and all other varieties of gain-time played essentially the same role in the contemporary Florida penal system.

[27] Provisional release credits could be awarded when prisons reached 97.5% of their lawful capacity. § 944.277, Fla. Stat. (Supp. 1988) (Lodg. Doc. 19). When the prison population reached that trigger level, inmates who satisfied the requirements for "incentive gain-time" were eligible for an award of provisional release credits, subject to offense-based exclusions. There were no other preconditions for the award of provisional release credits.

Accordingly, the retroactive withdrawal of provisional release credits violates the Ex Post Facto Clause.

D. The Retroactive Offense-Based Exclusions Created by the 1992 Act Undermine the Fundamental Interests the Ex Post Facto Clause Is Designed to Protect.

At least three important public policies underlie the Ex Post Facto Clause: (1) to restrain government from enacting arbitrary and vindictive legislation, *see Miller* v. *Florida*, 482 U.S. 423, 429 (1987); *Weaver*, 450 U.S. at 29; *Malloy* v. *South Carolina*, 237 U.S. 180, 183 (1915); (2) to give the public fair warning of and permit reliance on the criminal law, *see Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 28; and (3) to maintain the separation of powers, *see Weaver*, 450 U.S. at 29 n.10. Respondents' application of the 1992 Act to petitioner flouts each of those policies.

Most significantly, the retroactive application of the 1992 Act to re-imprison petitioner exemplifies arbitrary and vindictive government treatment of a selected group of citizens in service of political expedience. It is clear from the Florida Attorney General's opinion that his novel interpretation of the 1992 Act was prompted by concerns expressed by certain elected officials about the impending release of Donald McDougall, an infamous murderer and child abuser who had accumulated provisional release credits pursuant to statute.[28] Without any clear textual support, the Florida Attorney General adopted an interpretation of the 1992 Act that not only precluded future acquisition of provisional credits by those convicted of

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[28] *See* 1992 Op. Att'y Gen. Fla. 92-96 at 283 (December 29, 1992) (App. B) ("[T]here is great concern in Central Florida regarding the impending release of Donald Glenn McDougall who was convicted of second degree murder and aggravated child abuse."); *see also* Letter to Attorney General Butterworth (Dec. 30, 1992) (App. C).

murder offenses, but also required the revocation of all credits previously awarded to members of this disfavored group.[29] The result of this construction of the 1992 Act was to cancel the scheduled release of a large number of Florida prisoners and to reimprison petitioner and approximately 90 others.[30]

No authority need be cited for the proposition that the impending release of violent offenders is an unsettling prospect for many citizens and their elected representa-

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[29] *See* Letter to Secretary Singletary (Dec. 31, 1992) (App. D). This Court recently reaffirmed the principle that, absent clear contrary legislative intent, statutes are presumed to apply only prospectively. *See Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994) and authority cited therein. This presumption against retroactivity is deeply rooted in our nation's jurisprudence and finds expression in several provisions of our Constitution, including Article I, § 10. *Id.* at 1497; *see Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."). The Ex Post Facto Clause demonstrates the Framers' concern that the "[Legislature's] responsivity to political pressures pose[d] a risk that it [would be] tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 114 S. Ct. at 1497. The Florida Attorney General failed to apply the presumption against retroactivity to the 1992 Act when he implied a legislative intent to withdraw early release credits previously granted to selected classes of inmates who committed crimes prior to the 1992 enactment. *See* 1992 Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992) (App. B); Letter to Secretary Singletary (Dec. 31, 1992) (App. C). The Ex Post Facto Clause is intended to prevent this unfair method of governance. Indeed, without constitutional restraints on retroactive legislation, the "Legislature's unmatched powers [would] allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 114 S. Ct. at 1497.

[30] *See* Wilda L. White, "New State Policy Shatters Freed Convict's New Life," *Miami Herald* 1A (Aug. 3, 1993) (Lodg. Doc. 152) (89 released prisoners re-imprisoned after revocation of provisional credits).

tives. There was an undeniable, strong temptation under the circumstances for the government to fail to meet the high standard of restraint and respect for the rights of unpopular minorities required by the Ex Post Facto Clause. Viewed in this light, the response of the Florida legislative and executive branches to the passions and concerns of their constituents was understandable. Of course, whether a government action was an understandable response to constituent pressure is not the constitutional test. Because that response retroactively imposed greater punishment on a selected group of citizens, it violates the Ex Post Facto Clause.

The application of the 1992 Act also violated basic separation of powers principles by granting to the Legislature the power to determine the retroactive effect of penal laws, thereby usurping the role of the judiciary and the executive. *See Weaver*, 450 U.S. at 29 n.10. Finally, as demonstrated in the following section, the application of the 1992 Act frustrated petitioner's reasonabie expectations and reliance on the law in effect at the time of his conduct and at the time of his plea and sentencing, by changing the law retroactively and without fair warning. *Cf. id.* at 28-29.

E. At the Time of His Plea and Sentencing, Petitioner Reasonably Should Have Expected That He Would Benefit from the Award of Provisional Release Credits.

Several decisions of this Court note that the Ex Post Facto Clause also protects a prisoner's reliance in plea bargaining on his reasonable expectations regarding punishment and his right to fair notice and warning regarding changes in the law governing punishment. *See Weaver*, 450 U.S. at 32; *cf. Morales*, 115 S. Ct. at 1604. In denying petitioner's habeas request, the district court relied primarily on the opinion of the Eleventh Circuit in *Hock* v. *Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert.*

denied, 116 S. Ct. 715 (1996).[31] *Hock* held that the retroactive denial of "control release"[32] credits to previously eligible inmates did not violate the Ex Post Facto Clause, in part because the expectation of early release due to prison overcrowding was too conjectural. 41 F.3d at 1472-73. The court reasoned that, unlike "gain-time" early release credits for good behavior, *see Weaver*, 450 U.S. at 32, "control release" credits were contingent on future overcrowding and, therefore, a prisoner could not reasonably rely on the potential award of such credits in making plea bargaining decisions. *See Hock*, 41 F.3d at 1472-73.[33]

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[31] *See* Order of the United States District Court Dismissing Petition (J.A. 64); Report and Recommendations of United States Magistrate Judge (J.A. 58-59).

[32] The "control release" statute, § 947.146(2), Fla. Stat., was enacted in 1989 and provided for another category of early release credits to maintain the prison population at or below 99 percent of lawful capacity. *See Hock*, 41 F.3d at 1472-73.

[33] This analysis flatly contradicts that court's prior decision in *Raske* v. *Martinez*, 876 F.2d 1496 (11th Cir.), *cert. denied*, 493 U.S. 993 (1989), where it held that a law resulting in the retroactive denial of "incentive gain-time" violated the Ex Post Facto Clause. "Incentive gain-time" is a type of early release credit awarded for exceptionally diligent work and good deeds. *See, e.g.*, § 944.275(4)(b)-(c), Fla. Stat. (1993) (Lodg. Doc. 15). This Court has previously recognized that the award of incentive gain-time "is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program." *Weaver*, 450 U.S. at 35. The *Raske* court noted that "the [Florida Corrections] department decides *in its sole discretion* whether the prisoner has behaved well enough or worked diligently enough to earn gain-time" and that "the opportunity to earn incentive gain-time is *dependent on the grace of the legislature* and the availability of jobs . . ." 876 F.2d at 1499-1500 (emphasis added). Despite the fact that an inmate's acquisition of incentive gain-time is contingent on legislative and executive decisions and other circumstances outside of the inmate's ability to control or even influence, the Eleventh Circuit held that the retroactive denial of those early release credits violated the Ex Post Facto Clause. *Id.* In so holding, the court found irrelevant to the ex post facto

If the prospect of possible acquisition of early release credits for good behavior is not too speculative to undergird reasonable expectations of early release, neither is the award of provisional credits due to prison overcrowding. *Cf. Weaver*, 450 U.S. at 24 (invalidating Florida law that retroactively reduced amount of "gain-time" early release credits a prisoner could earn). Moreover, while the award of administrative and provisional release credits was indeed contingent on prison overcrowding, the burgeoning Florida prison population at the time of petitioner's plea and sentencing made the award of these credits a near certainty.[34] To the extent that it was rational for petitioner and his lawyer to consider the possibility of early release for good behavior, *see id.* at 32, it was equally rational for them to factor into their calculations the probability of acquiring provisional credits.[35] Thus, the retroactive application of the

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inquiry the question of the likelihood that an inmate would obtain early release due to the award of incentive gain-time. *Id.* at 1500.

[34] Since 1980, the Florida Department of Corrections had been under court order to reduce the Florida prison population. *See Costello* v. *Wainwright*, 489 F. Supp. 1100 (M.D. Fla. 1980). Less than a month before petitioner pleaded *nolo contendere* and was sentenced, the number of inmates in Florida's state prisons exceeded 98 percent of capacity, the statutory trigger for authorization of provisional release credits. *See* Mark Dykstra, *Apart from the Crowd: Florida's New Prison Release Program*, 14 Fla. St. U. L. Rev. 779 (1986). Writing in 1986, Dykstra stated that "[the] prison population problem in Florida is an issue that will not go away." *Id.* at 809.

[35] Petitioner's choices over the six months between late 1985 and early 1986, encompassing his crime, plea, and sentencing for attempted murder, were made against a backdrop of penal law and a corrections system that relied heavily on statutorily-prescribed early release credits to reduce prisoners' actual time of incarceration. In combination with statutory provisions defining the applicable sentence for the crime, petitioner could reasonably consider the availability of early release credits as an important element of his assessment of the possible punishment and in his decision to plead

1992 Act closed a previously available avenue of early release, and defeated Mr. Lynce's reasonable expectations, without the constitutionally required fair warning. *Id.* at 28-31.

II. THE COURT BELOW ERRONEOUSLY CHARACTERIZED § 944.277 AS A PROCEDURAL LAW.

The district court's order denying Mr. Lynce's petition for a writ of habeas corpus relied almost exclusively on the Eleventh Circuit's decision in *Hock* v. *Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996). The Eleventh Circuit affirmed the district court without opinion, apparently relying on *Hock* as well.[36] In *Hock*, the Eleventh Circuit held that laws rendering a convicted murderer retroactively ineligible for control release did not violate the Ex Post Facto Clause. *See id.* at 1471-73. In a short opinion, the court reasoned that the Ex Post Facto Clause was not implicated because the control release law was "procedural" in nature and, therefore, did not affect the quantum of punishment attached to the crime.[37] *See id.* at 1472. This holding was erroneous.

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nolo contendere. *Cf. Eady* v. *Florida*, 622 So. 2d 61 (Fla. 1st Dist. Ct. App. 1993) (per curiam) (misinformation provided by counsel regarding effect of provisional release credits on length of incarceration constitutes ineffective assistance of counsel).

[36] The Eleventh Circuit decided *Hock* several months before this Court's *Morales* decision. Therefore, *Hock* did not benefit from this Court's most recent teaching on the Ex Post Facto Clause. This Court recently vacated a decision of the Florida Supreme Court involving similar issues, and remanded the case to the Florida Supreme Court for further consideration in light of *Morales*. *See Calamia* v. *Singletary*, 115 S. Ct. 1995 (1995) (mem.). *Hock*, in turn, relied in large part on pre-*Morales* decisions of the Florida Supreme Court. It is not clear that the Eleventh Circuit or the Florida Supreme Court would reach the same conclusion regarding the issues presented in *Hock* after *Morales*.

[37] The court alternatively held that control release was too contingent on prison overcrowding to support a reasonable expectation of reduced punishment. *See Hock*, 41 F.3d at 1472-73.

A. The 1992 Act Is Not a Procedural Law, Because It Increased the Punishment Attached to Certain Crimes.

To be sure, the protections of the Ex Post Facto Clause were not intended "to limit the legislative control of . . . modes of procedure which do not affect matters of substance." *Beazell* v. *Ohio*, 269 U.S. 167 (1925). In the ex post facto context, this Court has assigned the word "procedural" a clear meaning: procedural changes are those that produce "no change in the quantum of punishment attached to the crime." *Dobbert* v. *Florida*, 432 U.S. 282, 294 (1977). In stark contrast, the 1992 Act directly resulted in the arrest and re-incarceration of petitioner and the addition of several years to his punishment. This undeniable increase in punishment attached to petitioner's crime precludes characterization of the 1992 Act as merely procedural. *See id.* at 293-94.

The substantive nature of the 1992 Act is even more clear when it is compared with laws which this Court has found to be procedural. The statute in *Beazell* presents a clear example of a procedural law. There, the Court held that a law authorizing for the first time the joint trial of persons jointly indicted for a felony was procedural, because it affected only the manner in which the trial would be conducted and not the definition of the crime or the extent of the punishment. *See Beazell*, 269 U.S. at 170. *Collins* v. *Youngblood*, 497 U.S. 37 (1990), presented a challenge to a statute authorizing an appellate court to reform the defective judgment of a trial court by deleting a fine not authorized by statute, without granting an entirely new trial as required by prior law. In holding that the law was procedural, the Court stated that "it is logical to think that the term ["procedural"] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* at 45. Finally, the Court in *Dobbert* held that a law that altered the division of labor between judge and jury in capital trials was procedural,

because it "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." 432 U.S. at 293-94.

By contrast, statutes that retroactively enhance the severity of a crime for purposes of determining its punishment are not procedural. In unanimously striking down a retroactive change in the Florida sentencing guidelines, this Court distinguished the case before it from *Dobbert*:

> The 20% increase in points for sexual offenses in no wise alters the method to be followed in determining the appropriate sentence; it simply inserts a larger number into the same equation.

Miller v. *Florida*, 482 U.S. 423, 433-34 (1987).

Likewise, in the instant case, the 1992 Act left untouched the *procedures* for determining whether inmates not excluded by the statute would be granted provisional release credits. The award of such credits remained contingent on maintaining the same behavior record necessary for good behavior credits and upon the size of the prison population. However, the 1992 Act changed the legal consequences and quantum of punishment attached to particular crimes. Those convicted of attempted murder were declared ineligible for provisional credits *based on the nature of their crimes.* This result is the same as if (as in *Miller*), the legislature had assigned more "offense points" to attempted murder and retroactively excluded those inmates from eligibility for early release credits on the basis of their increased offense points. In the early release context, it is difficult to imagine a clearer example of a substantive change in the penal law.

B. Florida's Purpose in Adopting the 1992 Act Is Irrelevant to the Determination of Whether the Statute Is Procedural.

The Eleventh Circuit's conclusion in *Hock* that changes in the laws governing "control release" credits are procedural rests on the premise that overcrowding credit statutes and amendments were enacted solely to address an "administrative problem." *Hock*, 41 F.3d at 1472. This premise is doubtful and, even if correct, does not determine whether the law is procedural.[38] Relying heavily on the Florida Supreme Court's opinion in *Dugger* v. *Rodrick*, 584 So. 2d 2, 4 (Fla. 1991), *cert. denied sub nom. Rodrick* v. *Singletary*, 502 U.S. 1037 (1992), the *Hock* court emphasized that the purpose of the control release statute was to "address the administrative problem of prison overcrowding, not to confer a benefit on the prison population." *Hock*, 41 F.3d at 1472. However, the fact that a penal law was enacted for administrative convenience has never been held to insulate it from the

[38] *Morales* indicates that the motivation of the enacting legislature is irrelevant to the ex post facto inquiry. *See id.* at 1605. However, even if legislative motivation were relevant, it is doubtful that the Florida Legislature's intent in amending § 944.277 was limited to its administrative concerns regarding prison overcrowding. Any inquiry into legislative intent properly must focus on the changes effected by the 1992 amendment, *i.e.*, the expansion of the list of offense-based exclusions. The motivation of the Legislature in enacting the *original* early release credits program established by § 944.277 is immaterial to this assessment. While the Florida Attorney General erroneously opined that "[t]he statute is not tied to inmate conduct" to support his claim that the 1992 Act was purely administrative, in the very next sentence he referred to the "legislative intent" evident in the 1992 amendment "to remove [inmates convicted of murder offenses] from the pool of eligible inmates." Letter to Secretary Singletary (Dec. 31, 1992) (App. D). Because the 1992 Act rendered selected inmates ineligible for early release credits on the basis of their crimes, any argument that the Florida Legislature enacted the Act purely out of administrative convenience and without regard for substantive issues of punishment stretches credulity.

requirements of the Ex Post Facto Clause. This Court has never wavered from the principle that penal provisions, even when "accorded by the grace of the legislature," are unconstitutional if they operate to increase punishment retroactively. *See, e.g., Weaver*, 450 U.S. at 30-31. The Court's opinion in *Morales* makes clear that the proper focus of the inquiry is on the actual effect of the law on the prisoner's punishment, not on the legislature's motivation for enacting the law. *See Morales*, 115 S. Ct. at 1605.[39]

Incarceration is punishment, and longer incarceration is greater punishment. By withdrawing 1,860 days of provisional credits from Mr. Lynce, the 1992 Act enhanced his punishment by lengthening his term of incarceration. The clear import of the Court's ex post facto decisions is that a statute retroactively effecting such a substantial change in punishment is unconstitutional. Contrary to the command of the Ex Post Facto Clause, the 1992 Act had the intent and effect of singling out a group of offenders—a group that included the Petitioner—and increasing the punishment attached to their crimes after those crimes had been committed.

[39] The Third Circuit understands *Morales* to stand for the proposition that the only relevant inquiry is into the *effect* of the new law on punishment. *See Artway* v. *Attorney General*, 81 F.3d 1235, 1260-61 (3d Cir. 1996) ("The opinion . . . [in *Morales*] spends the bulk of its analysis examining the effect of the legislative change on Morales. . . . In doing so, it concedes that a measure effectively extending a sentence of imprisonment constitutes punishment, presumably regardless of the legislature's motivation.") (internal citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed and the Petition for Writ of Habeas Corpus should be granted.

Respectfully submitted.

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July 12, 1996

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APPENDICES

APPENDIX A

1992 SUPPLEMENT TO FLORIDA STATUTES 1991

944.277 Provisional credits.—

1. Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

   a. Is serving a sentence which includes a mandatory minimum provision for a capital offense or drug trafficking offense and has not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

   b. Is serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2);

   c. [1] Is convicted, or has been previously convicted, of committing or attempting to commit sexual

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[1] Note.—

A. Section 3, ch. 90-186 provides that "[a] person who is convicted, or has been previously convicted, of committing prior to the effective date of this act a lewd or indecent assault or act specified in section 944.277(1)(c), Florida Statutes, is eligible for provisional credits. However, a person who is convicted or has been previously convicted, of committing or attempting to commit a lewd or indecent assault or act as a result of masturbating in public, exposing the sexual organs in a perverted manner, or non-consensual handling or fondling of the sexual organs of another person is not eligible for provisional credits."

B. Section 19, ch. 90-337, provides that "[e]ffective July 1, 1990, an inmate convicted of a lewd or indecent act not listed in s. 944.277(1)(c), Florida Statutes, shall receive retroactive benefit of all provisional credit awards made during the service of his sentence, provided that he is not otherwise ineligible for, or excluded from, receiving such an award." Chapter 90-337 was signed into law on July 3, 1990.

battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

d. Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the offense;

e. Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense;

f. Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse; sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;

g. Is sentenced, or has previously been sentenced, or has been sentenced at any time under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender;

h. Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); or against a state attorney or

assistant state attorney; or against a justice or judge of a court described in Article V of the State Constitution; or against an officer, judge, or state attorney employed in a comparable position by any other jurisdiction; or

i. Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.041 (1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction; or

j. Is serving a concurrent sentence in another state or federal jurisdiction.

In making provisional credit eligibility determinations, the department may rely on any document leading to or generated during the course of the criminal proceedings involving the inmate, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

2. The secretary's authority to grant provisional credits in increments not exceeding 60 days will continue until the inmate population of the correctional system reaches 97.5 percent of lawful capacity, at which time the authority granted to the secretary will cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

3. At such time as provisional credits are granted, the Department of Corrections shall establish a provisional release date for each eligible inmate incarcerated, which will be the tentative release date less any provisional credits granted.

4. Any eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits. Any inmate who is under any

type of release program of the department is not eligible for an award of provisional credits.

5. Any inmate who is serving one or more sentences of imprisonment imposed as a result of an offense that occurred on or after July 1, 1988, who receives 30 or more days of provisional credits, and who is not required to be released only under conditional release supervision pursuant to ss. 944.291 and 947.1405 must be released into the provisional release supervision program on his provisional release date, unless such inmate is also serving a sentence for an offense that occurred before July 1, 1988. The department shall contract with public or private organizations for the delivery of basic support services while an inmate is in the provisional release supervision program. Support services shall include, but not be limited to, substance abuse counseling, temporary housing, family counseling, and employment support programs. Inmates who are released into the provisional release supervision program are not eligible for any additional gain-time. If an inmate has received a term of probation, community control supervision, conditional release supervision, or control release supervision to be served after his release from incarceration, the period of probation, community control supervision, conditional release supervision, or control release supervision must be substituted for the period of supervision under the provisional release supervision program.

6. The terms and conditions of provisional release supervision must be specified in writing, and a copy must be given to the inmate at the time of his release from incarceration. If the inmate's conviction was for a controlled substance violation, the conditions shall include a requirement that the inmate submit to random substance abuse testing intermit-

tently through the term of supervision, upon the direction of the correctional probation officer as defined in s. 943.10(3). The term of supervision must be equal to the number of provisional credits accrued, but may not exceed 90 days unless extended as provided in subsection (7).

7. If an inmate violates any term or condition of provisional release supervision, the Department of Corrections may take any of the following action:

   a. Continue provisional release supervision.

   b. Extend the term of supervision not to exceed the total number of provisional credits the inmate has accumulated.

   c. Terminate the provisional release supervision and return the inmate to prison. If an inmate is returned to prison, credits accumulated as of the date of release to the provisional release supervision program may be canceled as prescribed by department rule.

8. If an inmate absconds from provisional release supervision, the Department of Corrections may issue a warrant for his arrest as provided by s. 944.405. The failure of an inmate to report to the designated parole and probation office within 10 days after his release from incarceration constitutes a violation of the provisional release supervision program and will result in issuance of a warrant for arrest of the inmate.

9. The Department of Corrections shall adopt rules to implement the provisional release supervision program.

History.—s. 5, ch. 88-122; s. 4, ch. 89-100; s. 5, ch. 89-526; s. 5, ch. 89-531; s. 2, ch. 90-77; s. 1, ch. 90-186; s. 14, ch. 90-337; s. 14, ch. 91-280; s. 12, ch. 92-310.

APPENDIX B

[Relevant Excerpts Only—Full Document Lodged with the Court]

AGO 92-96—DECEMBER 29, 1992

CORRECTIONS, DEPARTMENT OF—INMATES—GAIN-TIME

AWARD OF PROVISIONAL CREDITS TO INMATES CONVICTED OF CERTAIN OFFENSES

To: The Honorable Gary Siegel, Senator, District 12; The Honorable Norman R. Wolfinger, State Attorney, Eighteenth Judicial Circuit; Mr. Harry K. Singletary, Jr., Secretary, Department of Corrections

You recognize that there is great concern in Central Florida regarding the impending release of Donald Glenn McDougall who was convicted of second degree murder and aggravated child abuse. The Department of Corrections has calculated provisional release credits under s. 944.277, F.S. (1992 Supp.), for McDougall which would dramatically reduce the time he must serve under his original sentence.[1] There is concern, however, that the provisions of s. 944.277, F.S. (1992 Supp.) were not intended to operate to permit the early release of convicted felons such as McDougall. You, therefore, ask my opinion regarding the interpretation of s. 944.277, F.S. (1992 Supp.).

While your concern regarding the impending release of McDougall prompted your inquiries to this office, the

[1] This office has been advised by the Department of Corrections that since January 1991, the provisions of s. 947.146, F.S., creating a controlled release program, have been used to regulate the prison population. However, McDougall's scheduled release is based upon a calculation of provisional credits pursuant to s. 944.277, F.S.

questions you pose are general in nature and may be substantially stated as follows:

QUESTIONS: . . .

* * * *

3. Does s. 944.277(1)(i), F.S. (1992 Supp.), prohibit provisional credits being awarded to an inmate convicted of murder?

SUMMARY: . . .

* * * *

3. Section 944.277(1)(i), F.S. (1992 Supp.), prohibits provisional credits being awarded to an inmate who has been convicted of murder, regardless of when such conviction occurred.

AS TO QUESTION 3:

Section 944.277(1)(i), F.S. (1992 Supp.), prohibits the awarding of provisional credits to an inmate who has been convicted of murder.[2] The prohibition was added to s. 944.277 by Ch. 89-100, Laws of Florida. In so amending the statute, the Legislature did not set forth the entire text of subsection (1) but only the newly created paragraphs (h) and (i) as amendments to that subsection.[3] Section 6 of Ch. 89-100 provided that the act took effect January 1, 1990, and would apply to offenses committed on or after the effective date. The Division of Statutory Revision, in compiling the 1989 Florida Statutes, appended a footnote to s. 944.277(1)(h) and (i), recognizing that the provisions of those para-

[2] *See*, s. 944.277(1)(i), F.S. (1992 Supp.), prohibiting the award of provisional credits to an inmate who:

> Is convicted, or has been previously convicted, or committing or attempting to commit murder in the first, second, or third degree under s. 728.04(1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction. . . .

[3] *See*, s. 4, Ch. 89-100, Laws of Florida.

graphs applied only to offenses committed on or after January 1, 1990.

Section 944.277(1), F.S. 1989, was amended by Ch. 90-186, Laws of Florida, which set forth the entire text of the subsection. Section 4 of Ch. 90-186, Laws of Florida, stated that the act "shall take effect October 1, 1990, and shall apply to offenses committed on or after the effective date." The reference to s. 944.277(1) in the 1991 Florida Statutes notes that subsection (1) applies to offenses committed on or after October 1, 1990; the footnote to paragraphs (h) and (i) which had been contained in the 1989 Florida Statutes was deleted.

The 1992 Legislature again amended subsection (1) of s. 944.277, F.S., setting forth the entire text of the subsection in s. 12, Ch. 92-310, Laws of Florida. In prescribing an effective date, however, the act contained no restriction on the subsection's application to offenses committed after a certain date. The 1992 Supplement to the Florida Statutes does not recognize any such limitation for any provision of subsection (1).

As noted *supra*, s. 944.277, F.S., establishes the procedures to be used by the Department of Corrections to reduce the prison population and is not a substantive matter of punishment or reward. Statutes relating to remedies or procedures operate retrospectively.[4] Thus, absent a limitation, s. 944.277, F.S., as a procedural statute, applies retroactively. The courts have expressly recognized that the statute may be retroactively applied.[5] It was thus necessary for the Legislature in 1989 and 1990 to impose a limitation in order for the provisions of subsection (1) to operate prospectively only.[6]

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[4] Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (4.D.C.A. Fla., 1985).

[5] *See*, Dugger v. Rodrick, *supra*.

[6] *Cf.* Dominquez v. State, 17 F.L.W. D1853, 1854 (1 D.C.A. Fla., filed July 29, 1992), recognizing that in order for the statute to be applied prospectively only, a specific proviso for offenses occurring after a certain date was needed. I am not unmindful that in that case the court held erroneous the interpretation given by the Department of Corrections that s. 944.277(1)(i) excluded murderers from receiving provisional credits who had committed any criminal offense after January 1, 1990, and had a prior murder conviction. The court stated that the statute disqualified murderers who committed a murder after January 1, 1990. The court, however, was interpreting the provisions of s. 944.277, F.S. 1989, and not the subsequent amendments to the statute in 1990 and 1992, and, thus, the court's decision would appear to be of limited application.

Such a limitation, however, was not imposed with the amendment of subsection (1) in 1992, and absent such a limitation, the provisions of that subsection would apply retroactively. Such a construction is consistent with the position which appears to have been taken by the Division of Statutory Revision, which is responsible for facilitating the correct and proper interpretation of the Florida Statutes.[7]

Accordingly, I am of the opinion, until legislatively or judicially determined otherwise, that s. 944.277(1)(i), F.S. (1992 Supp.), prohibits provisional credits being awarded to an inmate who has been convicted of murder, regardless of when such offense occurred.

* * * *

In summary, therefore, inasmuch as McDougall was convicted of murder in the second degree, he would appear to be precluded from receiving provisional credits pursuant to s. 944.277(1)(i), F.S. (1992 Supp.). Moreover, if the Secretary of Corrections determines that McDougall was convicted of aggravated child abuse with battery or aggravated battery as an element of that offense and that a sex act was attempted or committed during the commission of that offense, he would be precluded from receiving provisional credits pursuant to s. 944.277(1)(d), F.S. (1992 Supp.).

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[7] *See*, s. 11.242, F.S.

APPENDIX C

[FLORIDA DEPARTMENT OF CORRECTIONS LETTERHEAD]

December 30, 1992

The Honorable Robert A. Butterworth
Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

Dear General Butterworth:

The Department of Corrections has reviewed the opinion issued on December 29 in response to the questions submitted by the Department, Senator Siegel and State Attorney Wolfinger. A portion of the opinion issued in response to a question which I understand was submitted by State Attorney Wolfinger raises additional questions which require clarification before the Department may fully determine the impact of the opinion and apply it appropriately.

As you are aware, the specific question relating to the possible retrospective exclusion of murders under the amendments to Section 944.277(1)(i) and later statutory enactments was not initiated by the Department, due to the opinion of the First District Court of Appeal in *Dominquez v. State,* 17 F.L.W. D1853 (Fla. 1st DCA, July 29, 1992). The opinion issued on December 29 indicates that the *Dominquez* opinion has limited application. The Department has not seen the question submitted by State Attorney Wolfinger and, therefore, did not have benefit of the information, if any, accompanying the question. Thus, the Department does not know the full foundation upon which the opinion may be based. For this reason, the Department submits the questions at the end of this letter in connection with the opinion

issued on December 29 to be sure of the full import of the opinion prior to its application.

Preliminarily, I note the following. In two places within the opinion, you state that the Department has "calculated" provisional release credits under s. 944.277 (see page 1 and footnote 1). The Department was contacted yesterday by defense counsel who represent offenders in this area of the law regarding this language and whether the opinion would require the voiding of provisional credits. They argue that the Department has not merely calculated provisional credits but has granted and awarded a total of 1860 credits between July 1, 1988 and January 18, 1991; the date of the last award of credits following implementation of control release under s. 947.146. The application of these credits was made under s. 944.277(4).

The initial summary of the opinion, the final paragraph of the response to questions three, and the closing paragraph of the opinion all indicate that the amendments to s. 944.277(1)(i) now preclude the award of provisional credits under that section; however, the opinion does not make clear whether credits *previously* granted are subject to being voided or whether the retrospective effect of the amendments is accomplished through the denial of future credits to all inmates who formerly were eligible for provisional credits. The final summary paragraph of the opinion indicates that "inasmuch as McDougall was convicted of murder in the second degree, he would appear to be precluded from receiving provisional credits pursuant to s. 944.277(1)(i), F.S. (1992 Supp.)." Since all the awards of provisional credits granted and applied to reduce Mr. McDougall's overall release date were made on or prior to January 18, 1991, the only way to preclude the release of McDougall [1] and other similarly situated offenders is to void credits previously granted.

---

[1] The Department notes that McDougall's credits have already been voided on the basis of other portions of the opinion issued on December 29, 1992, related to his conviction for aggravated child abuse.

Defense counsel also pointed out that while the decisions of The Supreme Court of Florida in *Dugger v. Rodrick*, 584 So.2d 2 (Fla. 1991), *cert. denied*, 112 S.Ct. 885 (1992), and *Dugger v. Grant*, 17 F.L.W. S744 (Fla., December 10, 1992),[2] confirm that the early release mechanism under Section 944.277 is remedial in nature and do not create any substantive or procedural "liberty" due process rights, these decisions do not appear to specifically address whether an inmate may have a vested right to retain credits which have already been granted and applied to his release date. *See*, § 944.277(4), Fla. Stat. (1991) ("[a]ny eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits"); *cf. Waldrup v. Dugger*, 562 So.2d 687, 694-695 (Fla. 1990) (gaintime statutes do not create vested rights until gain-time actually is awarded). Furthermore, defense counsel contend that the only statutory authority given the Department to void or cancel credits appears in s. 944.277(7)(c). The Department advised defense counsel that a clarification of the opinion was to be requested as to the question of cancellation of the credits and that these concerns would be brought to your attention.

With this background, the Department now seeks clarification of the opinion issued on December 29, 1992:

> Do the 1992 amendments to s. 944.277(1) as discussed in Question Three of the December 29 opinion require that the Department void or cancel provisional credits previously given to offenders now excluded by s. 944.277(1)(i)?
>
> If so, is the cancellation or credits limited only to those offenders who were in custody on July 6, 1992, the effective date of the 1992 amendments, or must the cancellation be extended to those released prior

[2] The Department notes that the *Grant* decision is not yet final as a motion for rehearing has been filed and remains pending.

> to that date but still under supervision by the Department on that date?
>
> If cancellation of credits extends to those offenders still under supervision on July 6, 1992, and an offender has since completed supervision, must that offender be returned to custody to complete service of the sentence remaining after cancellation of credits?
>
> If cancellation of credits is mandated for all offenders in custody on July 6, 1992, and the Department released an offender affected by s. 944.277(1)(i) for expiration of sentence or to supervision on or after July 6, 1992, because of application of provisional release credits prior to January 19, 1991, must that offender be returned to custody to serve the balance of the sentence remaining after cancellation of credits?
>
> Is an offender who must be returned to custody following cancellation of credits entitled to credit for time out of custody under the principles of *Sutton v. Department of Corrections*, 531 So.2d 1009 (Fla. St. DCA 1988) and *Carson v. State*, 489 So.2d 1236 (Fla. 2d DCA 1986).

On December 31, 1992, the Department is scheduled to release offenders impacted by s. 944.277(1)(i) who previously received provisional credits under earlier eligibility periods.

Because of these impending releases, the Department respectfully asks that your office give expedited consideration to this clarification request.

Sincerely,

/s/
Harry K. Singletary, Jr.
Secretary

cc: Louis A. Vargas, General Counsel

APPENDIX D

[STATE OF FLORIDA LETTERHEAD]

December 31, 1992

Mr. Harry K. Singletary, Jr.
Secretary
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

Dear Secretary Singletary:

In light of this office's opinion in AGO 92-96, you ask additional questions about the department's responsibilities under s. 944.277 F.S. (1992 Supp.). Your questions may be summarized as follows:

> 1) In light of the 1992 amendments to s. 944.277 (1), F.S. (1992 Supp.), are inmates convicted of murder who are currently in the custody of the Department of Corrections eligible for release regardless of when the administrative calculation of provisional credits pursuant to s. 944.277 was made?
>
> 2) Must the Department of Corrections recommit inmates convicted of murder who have been released after July 6, 1992, by the department based in part on the department's calculation of provisional credits?

As your questions are interrelated, they will be answered together.

As discussed in AGO 92-96, the Legislature, with the 1992 amendment of s. 944.277(1), F.S., has manifested its intent that murderers are precluded from receiving provisional credits, regardless of when such conviction occurred. While you have referred to s. 944.277(4), F.S. (1992 Supp.), which states that eligible inmates shall receive provisional credits, that provision does not alter the above conclusion. The Supreme Court of Florida has recognized that the award of provisional credits under s. 944.277, F.S., is strictly an administrative mechanism to relieve prison overcrowding and is permissive rather than mandatory.[1] The statute is procedural only. As the Court made clear in the broad language of its recent decision in Dugger v. Grant,[2] inmates possess no vested or substantive right to be released under this program.

Thus, provisional credits previously authorized thereunder may be withdrawn, modified or denied by subsequent legislation.[3] Calculation of provisional credits prior to 1991 does not preclude the Legislature from modifying the statute to prohibit the release of certain offenders under this program since the exclusive purpose of the program is to relieve prison overcrowding. The statute is not tied to inmate conduct.

The amendment of the statute in 1992 manifests a legislative intent to remove these offenders from the pool of eligible inmates. Therefore, I am of the opinion that an inmate who has been convicted of murder and is in custody on or after July 6, 1992, is no longer eligible for release based upon an administrative calculation of provisional credits pursuant to s. 944.277, F.S. (1992 Supp.), regardless when such calculation was made.

While I am not aware of, nor have you drawn my attention to, any Florida court decision which compels the department to recommit inmates released after July 6,

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[1] *See, e.g.*, Dugger v. Rodrick, 584 So.2d 2 (Fla. 1991), *cert. denied*, 112 S.Ct. (1992).

[2] 17 F.L.W. S744, 746 (Fla., filed December 10, 1992), *pet. for rehearing pending*.

[3] Dugger v. Rodrick, *supra*, in which the Court held that the retroactive application of the inmate population control statute, as a procedural rather than substantive law, is not an ex post facto law, even though it may work to the disadvantage of the prisoner.

1992, the department retains jurisdiction over a prematurely released prisoner so long as his sentence has not expired.[4] The department as an administrative agency, however, must act in accordance with statutory directives.[5] The early release of an inmate without statutory authority does not excuse the inmate from serving the balance of his or her sentence and he or she may be recommitted by prison authorities unless judicially or legislatively determined otherwise.[6]

I trust that the above comments may be of some assistance to the Department of Corrections in meeting its statutory duties.

Sincerely,

/s/
Robert A. Butterworth
Attorney General

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[4] *See,* Carson v. State, 489 So.2d 1236 (2 D.C.A. Fla. 1986) (when an inmate is released or discharged from prison by mistake, he may be recommitted if his sentence would not have expired had he remained in confinement). When an inmate is released from prison by mistake, his sentence continues to run in the absence of some fault on his part. Sutton v. Department of Corrections, 531 So.2d 1009 (1 D.C.A. Fla., 1988). Thus an inmate recommitted by the department is entitled to credit for the time he spent at liberty.

[5] *See, e.g.,* Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So.2d 1375 (1 D.C.A. Fla., 1991) (administrative agency has only that authority which the Legislature has conferred by statute); City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973).

[6] *See, e.g.,* Johnson v. State, 561 So.2d 1254 (2 D.C.A. Fla., 1990) (fact an inmate was mistakenly released from custody before serving a prison sentence did not terminate that sentence); Green v. Christiansen, 732 F.2d 1397, 1400 (9 Cir. 1984).